IN THE

Supreme Court of the United States

No. 300 OCTOBER TERM, 1918.

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, Deceased, Petitioner,

vs.

THE DUBOIS ELECTRIC COMPANY, Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit,
and
Brief in Support Thereof.

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IN THE

Supreme Court of the United States

No. 860 OCTOBER TERM, 1918.

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, Deceased, Petitioner,

vs.

THE DUBOIS ELECTRIC COMPANY, Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:

The petition of Fidelity Title and Trust Company, Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased, respectfully represents:

1. On the 27th day of November, 1918, the United States Circuit Court of Appeals for the Third Circuit

by a per Curiam opinion (a copy of which is hereto attached, as Exhibit "A") reversed without a venire, contrary to the rule of this Honorable Court in *Slocum vs. The Insurance Company,* 228 U. S., 364, a judgment at law for the plaintiff for personal injuries and entered the judgment herein complained of.

2. The case is a controversy between citizens of different states in an amount conferring federal jurisdiction and originated in the District Court of the United States for the Western District of Pennsylvania.

The plaintiff, before verdict, died from his injuries, leaving his widow to survive him, his personal representative, the petitioner, being then duly substituted of record as plaintiff under the Pennsylvania statute providing therefor.

3. The injuries sued for were sustained under the following circumstances:

Pancoast, as a pedestrian, being lawfully on a sidewalk of a public thoroughfare in the Borough of DuBois, Pennsylvania, without fault on his part and without warning, was struck on the head by bricks of a falling chimney.

There had been stretched aloft from building to building across the highway a large heavy political banner which on Pancoast's side of the street had been—and in a negligent manner—anchored to the chimney, and it was this banner tugging at its anchor that precipitated the chimney upon Pancoast.

The fall of this chimney was directly due to its

being used as a fastening for the banner and to the negligent mode of attachment.

4. The DuBois Electric Company (the defendant in the District Court, the plaintiff-in-error in the Circuit Court of Appeals, and the respondent now), under a contract for hire with a political committee, erected the banner, using the chimney as a fastening, tied the banner up again after the accident, and, when it had served its purpose, eventually removed it altogether.

The ensuing verdict for the plaintiff establishing the negligence of the Electric Company's use of the chimney and mode of attaching the banner, is well supported by the proofs.

5. The fundamental question in the case was whether there was evidence tending to show that the contract of employment of the Electric Company embraced the Electric Company's maintenance of the banner at the time of Pancoast's injury, which occurred between the putting up and the final taking down of it.

6. The United States Circuit Court of Appeals for the Third Circuit had already in this very case (see *DuBois Electric Company vs. Fidelity Title and Trust Company*, 238 Fed. Rep. 129, 130, and 131) laid down for these litigants the rule as to the ground of this Electric Company's liability, namely, facts to support the inference of "a continuing duty resting on the Company so to maintain the banner that persons on the street should not be endangered," and accordingly at that time that Court granted the new trial which subsequently resulted in the verdict and judgment in ques-

tion and upon which new trial, in addition to the circumstances above cited, competent testimony from a member of the political committee who had engaged the defendant's services was adduced as follows:

> That the terms of the employment (which were oral) embraced "to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it; I wanted them to attend to it. I didn't want to go on the roof." (R., p. 36.)

"Q. Were you ever on the roof of the hotel building?

A. No, sir.

Q. Were you to go on the roof of the hotel building?

A. No, sir.

Q. Was there anything said in your dealings with the Electric Company for the hanging of this banner, about your control of it?

A. No, sir.

Q. Were you to have control over it?

A. No, sir. (R., p. 38.)

* * * * * * *

> "Just as I stated before, I went to the Electric Company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it; I wouldn't go on the roof, and wanted them to attend to it. That was my statement at the time." (R., p. 39.)

* * * * * *

> "After the banner had been up, I think the

first night, it came down. The next day they replaced it and that evening they reported to me that they had restrung the banner," &c. (R., p. 40.)

* * * * * * *

"A. That was the report, that the banner had come down.

Q. Did you know that yourself?

A. No. sir.

Q. Did you direct them to go up there and fasten it to the chimney?

A. No, sir.

Q. Did you have any conversation with them between the time that they received the banner from you, and the cleats, and the time that they fastened it to the chimney?

A. No, sir." (R., p. 41.)

After the accident, without any word from or participation by the witness, the banner was put up again. (R., pp. 46 to 47.)

"Q. Did any one consult with you respecting the suspension of the banner, between the time of the accident and the time you saw it hung back there?

A. No, sir.

Q. Did you give any direction with respect to the restringing of the banner after the accident?

A. No, sir.

Q. Had you given any directions with respect to

the stringing of the banner, at the time when they received it from you in the Acorn Club, up until the time of the accident?

A. No, sir." (R., p. 46.)

* * * * * * *

Not only was the Electric Company's putting back of the banner thus without further employment or direction, but,—

"Q. Who removed the banner finally?

A. From the poles?

Q. Yes.

A. The DuBois Electric Company." (R., pp. 46, 47.)

The Electric Company sent a bill for its entire service in respect of the banner, after it had finally taken the banner down, and this was duly paid. (R., p. 37 to p. 39.)

7. The trial was in strict accordance with the rule of the Circuit Court of Appeals which that Court, as above pointed out, had prescribed as controlling between these very parties in this very litigation, and, under a careful charge (R., p. 376 *et seq.*) by the trial judge in scrupulous conformity with that rule as laid down by the Circuit Court of Appeals, the jury found that the contract of employment did embrace the Electric Company's control of the banner at the time of the injury to Pancoast, and accordingly returned a verdict for the plaintiff in the sum of $9400. This was a moderate amount in view of Pancoast's totally destroyed earning power, his age of forty-three, and the serious char-

acter of his injuries, particularly to his brain, and the District Court pursuant to its opinion by the Honorable W. H. S. Thomson, J., refused to disturb it, and judgment was duly entered. (R., p. 394 *et seq.*)

8. In spite of this exact compliance, as is most respectfully submitted, with the Circuit Court of Appeals' own rule in this very case, that Court subsequently in a brief per Curiam opinion reversed the judgment on the verdict for the plaintiff—and without a venire—upon the ground that while "some evidence" was offered in support of a continuing duty, the testimony, in the opinion of the Circuit Court of Appeals, was "too meager" and "too vague,"—and this without specific reference to any of the testimony taken upon the re-trial. (R. p. 422.)

9. The judgment of the United States Circuit Court of Appeals is in these words,—

"The judgment is reversed." (R., p. 422.)

10. The petitioner relies for the allowance of the writ on the following

GENERAL REASONS:

(a) The United States Circuit Court of Appeals laid down a rule as to the measure of liability governing the rights and obligations of these litigants in this very action; that rule was fully met in a duly had trial at law before a jury; agree-

ably thereto under careful instructions from the trial judge that jury has found the fact that the Electric Company was employed to maintain the banner and maintained it negligently, to the serious hurt of Pancoast, a pedestrian, lawfully on a public highway of a sister state; and now the same Circuit Court of Appeals, in spite of strict compliance with its own rule for this cause, under an adequate supervision by the trial court, sets aside the ensuing finding of the fact by the jury without a *venire;* and

(b) The judgment of reversal is thus also in violation of the direction of this Honorable Court to the same United States Circuit Court of Appeals, requiring a reversal with "a direction for a new trial." (*Slocum vs. The Insurance Company,* 228 U. S., 364, 400.)

The petitioner respectfully submits that a United States Circuit Court of Appeals' reversal of a judgment upon a verdict establishing a disputed matter of fact, supported by evidence, duly adduced in compliance with that Appellate Court's own rule prescribed for the litigants in the same cause, is a case for the exercise of the authority to review which the Congress lodged with this Honorable Court in the statute creating the Circuit Courts of Appeals.

11. The petitioner furnishes as an exhibit to this petition a certified copy of the entire Transcript of Record of the case, including the proceedings in the Circuit Court of Appeals.

Wherefore the petitioner prays the Court to issue its writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to bring up this cause for review by this Honorable Court.

JAMES R. STERRETT,
M. W. ACHESON, JR.,
CHARLES ALVIN JONES,
Counsel for Petitioner.

Western District of Pennsylvania, }
County of Allegheny. } *ss.*

Before the undersigned authority personally appeared Alex. B. Reed, who, being duly sworn according to law, deposes and says that he is Asst. Trust Officer of Fidelity Title and Trust Company, the Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased, the petitioner, and that the matters of fact averred in the foregoing petition are true and correct, as affiant verily believes.

ALEX. B. REED.

Sworn to and subscribed before me this 14th day of February, 1919.

MARGARET CAGNEY,
Notary Public.

My appointment dated Feb. 5, 1918.
My commission expires end next session of Senate.

Exhibit "A."

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

DUBOIS ELECTRIC COMPANY.
vs.
PANCOAST'S ADMR.
No. 2371 October Term 1918.

Error to the District Court of the United States for the Western District of Pennsylvania.

PER CURIAM.

The principal facts of this case will be found in the opinion delivered on the former writ of error; 238 Fed. 129. We there decided, that the only ground for holding the Electric Company liable for the injury to Pancoast "would be a continuing duty resting on the company so to maintain the banner that persons on the street should not be endangered." On the trial now under review some evidence was offered on this question, and the verdict must be based on a finding that the company had undertaken the duty of maintenance, as well as the duty of hanging the banner and taking it down.

In our opinion, the only testimony in support of such a finding was too meager and too vague to justify the verdict, and the trial judge should therefore have given instructions in favor of the defendant.

The judgment is reversed.

Endorsed

2371

Opinion Per Curiam

Received and Filed

Nov. 27, 1918.

Saunders Lewis, Jr., Clerk.

BRIEF

In Support of Petition.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 860 October Term 1918.

FIDELITY TITLE AND TRUST COMPANY,
Ancillary Administrator of the Estate of
VERNON W. PANCOAST,
deceased, Petitioner.

vs.

THE DUBOIS ELECTRIC COMPANY,
Respondent.

Sur Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief on Behalf of the Petitioner.

1.

The fact and terms of the rule of liability in this litigation laid down by the Circuit Court of Appeals for these very parties, is conceded.

That rule was promulgated in *DuBois Electric Company vs. Fidelity Title and Trust Company,* 238 Fed. 129, 131, and what was there decided is also stated by the Circuit Court of Appeals in its recent brief per Curiam reversal embodied in the judgment herein complained of (R., p. 422, and *DuBois Electric Company vs.*

Pancoast's Administrator, Advance Sheets, 253 Fed. Rep. 987).

The rule is thus correctly repeated by the Circuit Court of Appeals in the last opinion (R., p. 422), namely,—

> "That the only ground for holding the Electric Company liable for the injury to Pancoast 'would be a continuing duty resting on the Company so to maintain the banner that persons on the street should not be endangered.' "

2.

The evidence abundantly measured up to this rule of liability thus prescribed by the Circuit Court of Appeals.

The testimony is quoted and epitomized in the petition (pp. 4 to 6, *supra*), as well as in Judge Thomson's opinion refusing a new trial (R., pp. 394 to 404).

That there was a contract of employment of the respondent in the premises of *some* scope—acted under, charged for, and paid for—was admittedly established by competent evidence (see also affidavit of defense, R., near ft. p. 28), the only possible inquiry being as to the *terms* of that employment.

It seems to us that the only justifiable *inference of fact* from the words spoken when the Electric Company

was employed, especially in the light of the Electric Company's acts during the period in question, was, that that Company had undertaken the duty of maintenance of the banner and was in control of it at the time Pancoast was hurt.

The trial Court's leaving the inference of fact to the jury—the employment being oral and all inferences of fact being of course for the jury, as Judge Thomson shows (R. pp. 403, 404)—was the utmost the respondent could ask for,—surely the trial Court could not have charged the jury as a matter of law that under the employment the Electric Company did not have control of the banner.

And as Judge Thomson further points out (R. p. 395), the trial Court endeavored to conform strictly to the decision of the Circuit Court of Appeals, and beyond question succeeded.

Our basic position of course depends upon existence of the necessary evidence to meet the rule laid down by the Circuit Court of Appeals, but it is submitted that compliance with that rule at once appears upon a reading of the testimony cited.

3.

Now, the Circuit Court of Appeals in its last opinion itself states that evidence on this basic question of liability *was* offered, but contents itself by characterizing that testimony as "meager" and as "vague," without

quoting any of it or pointing out wherein its vagueness or meagerness consists.

More remarkable still, the Circuit Court of Appeals builds on *a prior trial,* that reported in 238 Fed. 129, as though it were the repository of the facts *instead of the trial under review,* this in spite of the fact that the attention of the Circuit Court of Appeals was directly called by Judge Thomson (R., p. 395 *et seq.*) to the fact that the evidence now under review is different.

The Electric Company's liability also clearly appears from the evidence, not only under the rule of liability as thus prescribed by the Circuit Court of Appeals, but from the well settled authorities generally.

For example, in *Gray vs. Light Company,* 114 Mass. 149, an owner, whose chimney without his consent had been made unsafe by a gas company's affixing a wire to it so that the chimney fell upon a passerby, was allowed to recover from the Company for the damages which he had thus to pay.

So, had there been a recovery here against the owner of the hotel, he would have had an action over against the respondent. Thus in *Scullin vs. Dolan,* 4 Daly's Rep. 163, where a piece of the coping of a chimney fell and injured a pedestrian on the sidewalk, the Court exculpated the landowner, because the injury arose from the negligent, unauthorized use of the chimney by a third party. And in the case at bar, the political committee made no arrangement with the landowners (R., ft. p. 41.)

Where the work is turned over in a manner so negligently defective as to be imminently dangerous to third persons, the contractor continues liable. *Young vs. Smith and Kelly Company,* 4 Am. & Eng. Ann. Cases, 226.

In *Pennsylvania Steel Company vs. The Contracting Company,* 175 Fed. 176, 180, the Court said that it was immaterial that the dangerous thing made and turned over for use by others is a structure, instead of an article of commerce such as a drug.

In *Snare and Triest Company vs. Friedman,* 169 Fed. 1, a recovery was had against an independent contractor who piled iron beams dangerously on a public sidewalk.

Pancoast's injuries were the natural and direct result of the Electric Company's negligent act performed in relation to a subject matter over which it had control at the time.

4.

It seems to us that it cannot be, that a Circuit Court of Appeals may prescribe for parties in specific litigation a rule of liability and may then arbitrarily disregard compliance with its own rule.

We most earnestly disclaim any intention to treat the Circuit Court of Appeals with other than the greatest respect, but the duty to the client, as we see it, bids that we submit, as we most respectfully do, that the

action of the Circuit Court of Appeals was an abuse of discretion.

If we are right in our premises—and *there* is the testimony, there is the rule of the Circuit Court of Appeals, there is its per Curiam reversal without a venire —then surely we present a case for the exercise by this Court of its power of review.

Uniformity of decision *between* Courts of Appeals, (*Forsyth vs. Hammond,* 166 U. S., 506, ft. 514), spells a certiorari, why not uniformity in the same Court of Appeals itself in one and the same cause?

If as in *American Construction Company vs. Jacksonville Railway,* 148 U. S., 372, a judge's sitting in the Circuit Court of Appeals on a case in which he had taken part in the Circuit Court, justified the writ, why not where the Circuit Court of Appeals sets aside a verdict duly recovered in strict compliance with its own rule of liability laid down for the very parties in the very cause?

In *St. Louis, etc. R. R. Co. vs. Wabash R. R. Co.,* 217 U. S., 247, 251, the construction of a prior decree of a United States Circuit Court affirmed by this Court was one of the reasons for the grant of the writ, why not the more reason where a Circuit Court of Appeals arbitrarily disregards its own prior decision between the same parties?

After all, is this not eminently a case of "peculiar gravity and general importance"? *American Construc-*

tion Company vs. Jacksonville, etc. Railway Company, supra, 383.

A certiorari is appropriate in the case at bar. The federal jurisdiction is dependent entirely upon diversity of citizenship and the judgment of the Circuit Court of Appeals under the statute creating that Court is therefore final, and hence the case is expressly within the exception investing this Court with jurisdiction to review.

5.

Also, the reversal without a venire (R., pp. 422, 423) is in the teeth of this Court's direction to the same Circuit Court of Appeals in *Slocum vs. The Insurance Company,* 228 U. S. 364, 400, which reached this Court by certiorari by special allowance (217 U. S., 603 and p. 369 of 228 U. S.).

As this Court said in the *Slocum* case, (p. 399 of 228 U. S.), the right to a new trial is a matter of substance, for it gives opportunity "to present evidence which may not have been available or known before and also to expose any error or untruth in the opposing evidence," which was the very thing this petitioner did at the last trial and which, it is respectfully submitted, the complained of judgment undisturbed would indubitably nullify.

6.

The case in 218 Fed. 60, cited by the Circuit Court of Appeals at page 131 in its decision in 238 Fed. (the latter now cited in the present case, R. 422) was a suit which the Electric Company's former counsel brought *for Pancoast* against the municipality. Compare the appearance for Pancoast at page 61 of 218 Fed. with the appearance for the Electric Company at page 129 of 238 Fed. and notice that it was the Electric Company's counsel that brought Pancoast's unfounded suit against the municipality which the Circuit Court of Appeals properly reversed, *but that unfounded litigation has never been a reason for denying justice to Pancoast or his estate against the real tort feasor.*

Respectfully submitted,

JAMES R. STERRETT,
M. W. ACHESON, JR.,
CHARLES ALVIN JONES,
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 300

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, deceased, Petitioner,

vs.

THE DuBOIS ELECTRIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PLAINTIFF, THE PETITIONER.

ALLEN J. HASTINGS,
Olean, New York,
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TABLE OF CASES CITED.

TEXTS CITED.

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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 300

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, deceased, Petitioner,

vs.

THE DuBOIS ELECTRIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Brief on Behalf of Plaintiff, the Petitioner.

The record which this writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit brings up for review, discloses, that on November 27, 1918, that Court reversed, and without a venire, a judgment at law of the District Court of the United States for the Western District of Pennsylvania upon a verdict for $9,400.00 in favor of the present plaintiff,

the petitioner, for personal injuries to the deceased plaintiff, Vernon W. Pancoast, due to the negligence of the defendant.

Statement of the Case.

This suit was instituted in the District Court by Vernon W. Pancoast, a citizen and resident of the State of New York, against The Dubois Electric Company, a corporation of the State of Pennsylvania, resident in the Western District thereof, to recover damages for injuries received by Pancoast due to the defendant's negligence.

After bringing the suit, Pancoast died, and thereafter his personal representative (the petitioner) was substituted of record as plaintiff, for the purpose of prosecuting the action, under the statute of Pennsylvania in such case made and provided, (Sec. 18 of Act of April 15, 1851, Pamphlet Laws page 674; 3 Stewart's Purdon's Digest, p. 3238.)

At the trial contained in the record here for review, testimony in support of the plaintiff's action was adduced in substance as follows:

> On the afternoon of October 12, 1912, Pancoast, while lawfully on the sidewalk of a public thoroughfare in DuBois, Pennsylvania, was suddenly, and without warning, struck on the head by falling bricks from a chimney on the roof of a four story hotel abutting on the thoroughfare at that point.

The falling of the bricks was due to the pulling over of the chimney by the strain and tugging of a large mesh and canvass banner, twenty-four feet wide, fifteen feet deep, and weighing some thirty-five pounds, one upper corner of which had been made fast to the chimney.

The use of this chimney as an anchorage for the banner was the work of The DuBois Electric Company, the defendant, under a parol contract of employment with a political committee, calling for the services of the Electric Company in respect of a temporary suspension of the banner. Along with the banner turned over to the Electric Company were two iron cleats to be screwed to buildings on either side of the street and through the eyes of which when made fast was to be tied the rope to which the top of the banner was attached when originally given into the Electric Company's charge.

The Electric Company suspended the banner on October 6, 1912, by tying it to the cleats furnished for such purpose, fastening one cleat to the roof of the Commercial Hotel and the other to a bank building on the opposite side of the street. That night, the rope tied to the cleats broke on the hotel side at or near the edge of the roof. The next day the Electric Company, without instructions or directions from anybody, procured a galvanized cable three-eighths of an inch thick and, attaching the banner to it instead of to the rope, again suspended the banner across the street, making it fast

this time on the hotel side by wrapping the galvanized cable twice round the chimney and clamping it tightly together.

The chimney was of ordinary brick and mortar construction, some three and a half feet in height, twenty-one inches square at its base, with a flared or cornice top, on which rested a cement or stone cap on four brick corner posts. The chimney stood back from the edge of the roof about thirty-one inches. The roof was almost level, sloping slightly downward as it ran back from the street. The chimney was flashed around its base, to keep out the water, with tin from the roof turned up around it and inserted into a mortar joint in the chimney about two or three brick courses above the roof. The flashing was plainly visible and its effect on the mortar joint into which it was thus inserted was to weaken the chimney greatly for a lateral strain.

The defendant actually attached the banner to the chimney by first making the galvanized cable supporting the banner fast to the bank building on the opposite side of the street. The cable was then pulled across the street to the roof of the hotel, drawn tight by hand, wrapped twice round the chimney from four to six brick courses *above the flashing,* and was then drawn taut by block and tackle. When thus tightened on the chimney, the end and the body of the cable were clamped together. Each of the lower corners of the banner was attached below to the building on its respective side of the street.

After the chimney had pulled over, the clamped double loop in the cable made by the wrapping around the chimney was found intact down by the side of the hotel, showing that the cable had not fallen independently of the chimney and that the part of the chimney used for the fastening was the part pulled over.

After the pulling over of the chimney, the banner was restrung without word or direction from the political committee or the member who had employed the defendant's services, and following the election on November 5, 1912, the Electric Company went and took the banner down permanently, and thereafter rendered a bill (for its entire services in respect of the banner) to the member of the political committee who had engaged its services, which bill he duly paid.

In addition to the testimony as to the defendant's negligent method of fastening the banner to the chimney above the flashing, its acts of control over the banner during the time of its suspension, and the nondelivery by the defendant of control over the suspended banner to anyone at any time—the plaintiff adduced testimony that the parol contract between the defendant and the political committee for the defendant's services in respect of the banner, called for those services *throughout the period of the intended temporary suspension,* and this embraced the time of the injury to Pancoast.

Pancoast at the time of the injury was forty-three years old, married, and a man of good health and habits. By reason of his injuries, inflicted by the falling bricks, he suffered a definite loss, both

of earnings and earning power, was subjected to large expenses for surgical, medical and nursing services, and endured great pain and suffering, as well as permanent mental impairment and physical inconvenience.

The defendant admitted that it suspended the banner (Affidavit of Defense, P. R., p. 14), but denied that it had done so in a negligent way, and further sought to escape liability for negligence in its use of the chimney, on the ground that its undertaking did not contemplate its services throughout the period of the banner's suspension, and that prior to the injury to Pancoast it had, as it claimed, ceded control over the banner to the member of the political committee who had engaged its services. These alleged defenses were based on testimony, *all of which was oral and all of which was in dispute.*

The trial Judge submitted the case to the jury in a charge (P. R., pp. 196 to 202) fairly presenting, *inter alia,* the defendant's contentions and their related facts, which, as already noted, appeared only by oral testimony.

The jury returned a verdict in favor of the plaintiff in the sum of $9400.

The defendant made a motion for a new trial, which after argument the trial Court dismissed, entering judgment on the verdict for the plaintiff.

From this judgment the defendant appealed to the Circuit Court of Appeals and there contended, in addition to the question of control, that an amended statement of claim which had been filed by the plaintiff on April 27, 1916, under a new Practice Act of Pennsylvania effective January 1, 1916, had introduced a new cause of action barred by the statute of limitations. This amended statement set forth the cause of action virtually in the identical words averred in the original statement.

The Circuit Court of Appeals did not sustain the defendant's contention based on the statute of limitations, but in a brief per curiam opinion (P. R., p. 222) ruled that the testimony offered by the plaintiff was "too meager" and "too vague" to support the finding by the jury of the defendant's control over the negligently suspended banner at the time Pancoast was hurt, and that the trial Court should have given binding instructions for the defendant, and made an order reversing the judgment without directing a new trial.

The Circuit Court of Appeals having been given an opportunity by this Court to correct its order of reversal (249 U. S. 606), and not having done so, this writ was awarded (249 U. S. 597).

Questions Presented.

(1) Did the United States Circuit Court of Appeals for the Third Circuit err in reversing the judgment for the plaintiff without directing a new trial?

(2) Did that Court err in adjudging the testimony adduced by the plaintiff insufficient to support the finding by the jury of the defendant's control over its own negligent work at the time of the injury to Pancoast, and in ruling that the trial Court should, therefore, have directed a verdict for the defendant?

Specifications of Error.

I. The United States Circuit Court of Appeals for the Third Circuit erred in making the following order:

> "This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.
>
> On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs." (P. R., pp. 222, 223.)

II. The United States Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment entered by the District Court of the United States for the Western District of Pennsylvania.

ARGUMENT.

I.

The Judgment of Reversal Without a Direction for a New Trial Was Error.

(1) It was in direct violation of the rulings of this Honorable Court: *Slocum vs. Insurance Company*, 228 U. S., 364; *Pedersen vs. D. L. & W. R. Co.*, 229 U. S., 146, 153; *Myers vs. Pittsburgh Coal Co.*, 233 U. S., 184, 189.

(2) It even violated the practice erroneously relied upon for its authority.

Under the Pennsylvania Statutory Practice, a motion for judgment n. o. v. (filed with the trial Court after verdict and within the four days allowed for a motion for a new trial) and an exception thereafter to the trial Court's action on such motion, are prerequisites to any exercise of power of reversal by an Appellate Court. It is the trial Court's action on the motion for judgment n. o. v., properly excepted to and assigned for error, that may serve as basis for an order of reversal: *Philadelphia vs. Bilyeu*, 36 Pa. Super Ct., 562, 565; *Chatham National Bank vs. Gardner*, 31 Pa. Super. Ct., 135, 143.

Here, there was neither motion, exception, nor assignment of error.

It clearly appearing, then, that any reversal should have been with a new trial, the question properly arises,—

Does the testimony justify a reversal at all?

The question of the defendant's *negligence* may be eliminated. It was not raised by any assignment of error in the Court of Appeals nor mentioned by that Court, and it was found against the defendant by a verdict "based upon evidence so strong and convincing that there was scarcely any escape from it," as rightly said by the trial Judge on the defendant's motion for a new trial (P. R., page 208).

The question of control was likewise for the jury,—

II.

The Evidence Fully Justified the Jury in Finding the Defendant Still in Control at the Time Pancoast Was Hurt.

The Circuit Court of Appeals in its opinion (P. R. p. 222), filed with its order of reversal, builds *on a prior trial*, that reported in 238 Fed. Rep. 129, treating it as the repository of the evidence resulting in the judgment appealed from, *instead of the record then under review.*

This opinion itself on the former appeal in 238 Fed. Rep., 129, contains a number of inferences of fact at variance with the testimony then under review (as well

as that now under review) adduced by the plaintiff, and contains still other inferences arrived at only by treating as verity oral testimony of interested witnesses for the defendant (the credibility of everyone of whom was for the jury) as to the scope of the defendant's employment in respect of the banner.

But, however that may be, *that was a former record,* improperly relied upon by the Circuit Court of Appeals in the case at bar. It had remanded the case for a new trial, and at the ensuing retrial in the District Court, contained in the record now under review, the plaintiff proved that the defendant's parol undertaking called for its services in respect of the banner throughout its entire suspension.

(1)

M. O. Skinner, the member of the political committee who had engaged the defendant's services, testified to the terms of its undertaking as follows:

> "I went to the DuBois Electric Company and asked them to put the banner up for me and when the election was over to take it down, telling them I wanted nothing to do with it. I wanted them to attend to it. I didn't want to go on the roof." (P. R., p. 18.)

"Q. Were you ever on the roof of the hotel building?

A. No, sir.

Q. Were you to go on the roof of the hotel building?

A. No, sir.

Q. Was there anything said in your dealings with the Electric Company for the hanging of this banner about your control of it?
A. No, sir.
Q. Were you to have control over it?
A. No, sir." (P. R., p. 19.)

* * * * * * *

"Just as I stated before, I went to the Electric Company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it; I wouldn't go on the roof and wanted them to attend to it. That was my statement at the time." (P. R., p. 20.)

What Skinner says in cross-examination, as for example, at page 25 and again on page 27, is all to the same effect.

By virtue of this oral engagement, unchanged and unaltered in any respect, the defendant entered upon its work in connection with the banner.

What services was the defendant company to perform under its arrangement with Skinner? What were the terms of the parol contract, and what did those terms imply? These questions, we respectfully submit, were questions for the jury.

In *Philadelphia vs. Stewart*, 201 Pa., 526, it was held that the construction of an oral agreement is for the jury, and at page 530, Judge Dean said,—

"What the parties said and *what they meant by what they said* was for the jury to answer." (Italics are ours.)

As Judge Gibson said in *M'Farland vs. Newman*, 9 Watts (Pa.), 55, 59,—

"The construction of an oral agreement belongs to the jury."

And again in *Sidwell vs. Evans*, 1 Penrose (Pa.), 383, 386,—

"The construction of *written* evidence is for the *court* and of *parol* evidence for the *jury*." (Italics are ours.)

Pertinent authorities, surely, touching a Pennsylvania contract.

We respectfully submit that the *meaning* to be attributed under the circumstances to the words, "I wanted nothing to do with it. I wanted them to attend to it. I didn't want to go on the roof. * * * I asked them to put up the banner and take it down and look after it; I didn't want to have anything to do with it," (P. R., p. 18 to p. 36) especially in connection with the defendant's acts of control between the putting up and final taking down, was a matter of fact and not a matter of law. In other words, it was an inference of fact, and, therefore, exclusively for the jury.

From an examination of the charge of the trial Court, it will be seen that the jury was clearly and adequately instructed in strict accordance with the

Circuit Court of Appeals' own former rulings in this case (P. R., pp. 198 to 200; 208), and that it was with entire fairness left to the jury to say what the terms of this controverted oral contract in fact were.

But more than the parol contract of employment under which the defendant acted in respect of the banner, are the acts of control which the defendant performed throughout the banner's suspension, unbidden by anyone, save for the original engagement,—

(2)

The defendant company made the original fastening on October 6th, by tying the banner to the cleats after making them fast to the roof.

The defendant returned a second day, unrequested and undirected by anybody, after the rope supporting the banner had broken, and made the complained-of negligent fastening to the chimney—above the flashing.

As to this, Skinner testified as follows:

> "After the banner had been up, I think the first night, it came down. The next day they replaced it and that evening they reported to me that they had restrung the banner," etc. (P. R., p. 20.)
>
> * * * * * * *
>
> "A. That was the report, that the banner had come down.
>
> Q. Did you know that yourself?
>
> A. No, sir.

Q. Did you direct them to go up there and fasten it to the chimney?
A. No, sir.
Q. Did you have any conversation with them between the time that they received the banner from you, and the cleats, and the time that they fastened it to the chimney?
A. No, sir." (P. R., pp. 20, 21.)

After the accident, without any word or participation by Skinner, the banner was put up again. (P. R., p. 23.)

"Q. Did anyone consult you respecting the suspension of the banner, between the time of the accident and the time you saw it hung back there?
A. No, sir.
Q. Did you give any directions with respect to the restringing of the banner after the accident?
A. No, sir.
Q. Had you given any directions with respect to the strinking of the banner, at the time when they received it from you in the Acorn Club, up until the time of the accident?
A. No, sir." (P. R., p. 23.)

It was the defendant that took the banner down permanently at the end of its suspension just as originally agreed upon.

"Q. Who removed the banner finally?
A. From the poles?
Q. Yes?
A. The DuBois Electric Company.
Q. When?

A. I couldn't state just what time.
Q. How long after the accident?
A. It was right after the election." (P. R., p. 23.)

This was likewise without direction from Skinner, except for the original engagement. (P. R., p. 23.) Skinner, some days *after* the injury to Pancoast, without discharging the defendant from its undertaking "to attend to it," had requested the defendant company to remove the banner to a new location entirely (P. R., p. 23), where it used the poles the witness speaks of.

Several weeks after the defendant had finally taken the banner down, it rendered Skinner a bill for the whole of its services in respect of the banner from the time it first put it up until and including the final taking down, which bill Skinner paid. (P. R., p. 19.)

Is not the putting back of the banner by the defendant after it first came down very significant? The defendant did so upon its own initiative. Here is persuasive evidence in favor of the inferences which the jury drew from the words of employment as to the meaning and scope thereof. We have the parties' own interpretation of their undertaking. If the defendant's undertaking had merely been to put the banner up, by what right or requirement did it return the succeeding day and make an entirely different fastening of the banner? If its control after having originally suspended the banner extended into the second day, why did it not extend into the sixth—the day that Pancoast was hurt? If it was thus under obligation to return to the fastening on the roof and clamp the banner to

the chimney, why not also to go and correct its own negligent work? Such, indeed, was the defendant's duty under the terms of its employment, and the defendant by its actions clearly shows that it so understood its relation to the matter.

The parties' own interpretation of their contract is entitled to great, if not controlling, weight: *Topliff vs. Topliff*, 122 U. S., 121, 131; *Gillespie vs. Iseman*, 210 Pa., 1, 5; *Kendall vs. Klapperthal Co.*, 202 Pa., 596, 609.

Moreover, from the time of fastening the banner to the chimney, the defendant had a property right in it. It owned and provided the galvanized cable, which was to remain its property. (P. R., p. 24.)

In the light of the testimony, then, it seems to us that the evidence clearly justified the inference which the jury drew that the terms and scope of the defendant's employment, and the defendant's actions thereunder, implied its control, or supervision, over the banner during the entire period commencing with the original suspension and ending with the taking of it down.

(3)

Even if the inference of fact contended for by the defendant—that it was merely to put the banner up and take it down without responsibility therefor in the meantime—were fairly deducible, although we think it is not, it is surely not the only inference, and, therefore, it would have been error for the trial Court to instruct

the jury in favor of the defendant's interpretation, or, in other words, to have directed a verdict for the defendant.

It is only where oral evidence is of a kind "that different inferences cannot be drawn from it" that it is the Court's duty to take the question from the jury. *Insurance Company vs. Johnston,* 105 Fed., 286, 292.

In *Corset Co. vs. Simon,* 129 Fed., 144, 146, where the Court withdrew the meaning of the contract from the jury, it was because a verdict to the contrary would have been not only unsupported by testimony, but also unsupported by "legitimate inference from any fact in evidence."

In *Elliott vs. Wanamaker,* 155 Pa., 67, 74, cited by the defendant in the Circuit Court of Appeals, the Court there directed a verdict against the plaintiff because it accepted the plaintiff's own interpretation of the contract. This was without departure from the rule as to the jury's province to interpret parol contracts.

We confidently submit that the trial Court could not validly have charged the jury that, as a matter of law, under the contract of employment the defendant company had neither control nor supervision of the banner at the time of the injury to Pancoast, and we further submit that the fair and ordinary interpretation of the words used by the parties implied control by the defendant and that as confirmed by the defendant's acts of control during the suspension of the banner the jury would have gone counter to the facts and fair inferences

in the case, had they found differently than they did. Certainly, as it seems to us, the jury's finding cannot be adjudged inadmissible under the testimony in this case.

(4)

Moreover, the control contemplated by the terms of the employment is not alone determinative of the defendant's liability for its negligent work. A complete delivery by the defendant company to the political committee before the injury to Pancoast was equally vital to the defendant's theory of non-liability. This was unproven, certainly, not proven beyond dispute.

In *Curtin vs. Somerset,* 140 Pa., 70, relied upon by the defendant company, and in similar cases, where the Court was able to say *as a matter of law* that the contractor was not in control at the time of the complained of injury, not only were the terms of the contract of employment undisputed, but delivery of the work by the contractor to the owner and acceptance thereof by the owner were likewise not in dispute.

In the case at bar, the control, indisputably attaching to the defendant company by reason of its initial work on the banner, continued throughout the work performed thereafter on its own initiative.

When did the defendant terminate its control?

It failed to prove a delivery to the political committee of any completed work in respect of the banner at any time, either before or after the injury to Pan-

coast, until, indeed, it sent its bill for its entire services in respect of the banner several weeks after taking the banner down permanently, which of course was long after the injury.

The only testimony offered by the defendant on the question of delivery was the testimony of H. B. Johnson, one of the workmen for the defendant company, who testified as follows:

"Q. After fastening this cable around the flue, state whether or not you made any report of your work to M. O. Skinner?

A. Yes, sir.

Q. When was that?

A. In the evening after supper, I think it was.

Q. Where did you see Mr. Skinner?

A. On Long Avenue; West Long Avenue.

Q. What did you tell him with reference to this work?

A. I told him where we had fastened, around the flashing, at the bottom of the flue." (P. R., pp. 162, 163.)

(Disinterested witnesses said it was *above the flashing. Infra.*)

It clearly appears from the cross-examination of this witness, Johnson, that his meeting with Skinner was purely casual and that he had neither been authorized nor directed by his employer, the defendant company, to seek out Skinner and report to him on the banner work as completed:

"Q. How did you come to meet Mr. Skinner on Long Avenue?

A. I was walking down Long Avenue, and Mr. Skinner was going in the opposite direction.

Q. Who told you to see Mr. Skinner?

A. No one.

Q. Had Mr. Skinner ever talked to you about it before?

A. No, sir; not to my knowledge.

Q. Your son was the one that came to get you to go up on the roof the day you fastened it to the chimney?

A. Yes, sir.

Q. Where were you going at the time you met Mr. Skinner?

A. I don't remember. I was just walking on the street, I think.

Q. You were not going to see Mr. Skinner?

A. No, sir.

Q. You just happened to meet him on the street?

A. Yes, sir.

Q. Was it near where the banner was suspended?

A. Yes.

Q. And you told him the banner was fastened to the chimney?

A. Yes." (P. R., p. 163.)

* * * * * * *

"Q. You told Mr. Skinner that you had fastened it around the flashing of the chimney, didn't you?

A. Yes, sir." (P. R., p. 163.)

As to the point on the chimney where the cable was fastened, Johnson is contradicted by four disinterested witnesses for the plaintiff. (Oldnow; P. R., p. 39; Taylor; P. R., p. 45; Breon; P. R., p. 51; and J. F. Sober; P. R., p. 62.) So that even had Johnson been charged by his employer, as he was not, to make a formal delivery of the suspended banner to Skinner, would not his material disclosures in respect thereof have had to be true?

Skinner was never to go upon the roof, and the defendant company knew this.

No termination of control evidenced by a delivery was ever authorized, intended or made.

The control attaching to the defendant by reason of its admitted work on the banner—even assuming the truth of defendant's own version of its undertaking and ignoring the plaintiff's testimony—was on the very day of the injury to Pancoast just as unterminated by delivery, as it was on the day the defendant, unrequested by Skinner, returned to the roof and clamped the banner to the chimney.

(5)

Under circumstances such as are presented by the testimony now under consideration, the applicability of the rule relieving an independent contractor from liability for injuries to third persons depends on further questions of fact, even where there has been a delivery of his negligent work.

Did the independent contractor continue in a position with respect to his negligent work whereby he might have corrected it at any time prior to an injury to a third person, and, if so, did he fail to correct it?

The rationale of the rule in relief of an independent contractor from liability to third persons when out of control of his negligent work, is that he can no longer do anything to correct it without laying himself open to an action of trespass at the hands of the persons for whom he did the work: *Smith vs. Elliott*, 9 Pa., 345, 347. That was the case of an injury flowing from a nuisance, but the reason put forth in relief of the independent contractor's liabilty, when out of control, is the same.

Unless the right to make changes in the work (embracing the correction of negligence) rests *exclusively* in a deliveree, the reason for the rule in relief of the independent contractor fails. Why, then, should he not remain liable? He is the perpetrator of the wrong, and, *if he may correct it*, the duty to do so rests more heavily on him than on anyone else.

The law is never solicitous about relieving a tortfeasor from the natural and probable consequences of his own wrongdoing. It is only where it would be to impose a liability on him against which he thereafter has no power to relieve.

In the case under review, the defendant company's right to go upon the hotel roof was the same up until the chimney pulled over and hurt Pancoast as it was upon the days when it went upon the roof and made its

various fastenings. The consent of the landlord to the defendant company's going upon the roof, in so far as any consent was obtained at all, was, and was intended to be, obtained by the defendant company. (P. R., pp. 21, 56, 57.) In fact, the defendant company's employees who made the banner fastenings were upon the roof, right at the chimney, the morning of the very day that the chimney pulled over. They were stringing lights to illuminate the banner, which, although a matter of separate employment, was all in connection with the same general undertaking, at least so far as the defendant's *right* to go to the place of the banner fastening is concerned. It was the defendant company's right, as well as its duty, to go to the place of its negligent work any time up to the time Pancoast was hurt.

It was likewise the defendant company's right and duty to make a change in its negligent work when at the chimney.

The defendant not only had Skinner's consent, but it had a specific duty to keep the banner in a safe condition. It was the defendant company who was "to attend to it." Skinner was "to have nothing to do with it." And had the defendant company not already changed the banner fastening a few days before without asking Skinner anything about it?

In fact, an inference might properly be drawn that the defendant company had actually made a change in the cable fastening on the chimney the very day that the chimney pulled over. The defendant's witness, Johnson, says (P. R., p. 146) that he fastened the cable

around the flashing at the base of the chimney and that that was where it was at the time he went there on October 12th (the day of the injury) to string the lights. This testimony is controverted by four disinterested witnesses for the plaintiff, as hereinabove cited, but, assuming that the jury chose to believe Johnson's story, how did the cable (between the time he went there to string the lights and that afternoon) get up around the chimney above the flashing, where it undoubtedly was when the chimney pulled over? The jury might have inferred that the defendant not only had control over the banner but actually made a change in the fastening to the chimney the very day Pancoast was hurt. If, as Johnson's testimony shows, the fastening was changed the day they strung the lights, who did it? Why not the defendant's employees? They were the ones who saw fit to make use of the chimney in the first instance? Might it not have been to change the position of the banner a little with respect to the lights? Might not the defendant's employees have that day changed the position of the banner fastening, if it was changed as Johnson implies?

(6)

It never lay in the defendant's mouth to contend in its own relief that its presence on the hotel roof was without authority. The facts are these:

Skinner made no arrangement with the property owners (P. R., p. 21) but left to the defendant the whole matter of the banner suspension, with its attendant detail. The defendant's employees, charged with the work, went to the hotel to suspend the banner and,

upon being challenged by the clerk, in the landlord's absence from town, as to their right to make use of the hotel for the banner suspension, they assumed the landlord's consent by saying they would be responsible, and went ahead. (P. R., pp. 56, 57.) It was the defendant's business they were about, fully charged with respect thereto.

And even could the defendant set up its own acts as amounting to a trespass against the land owner, it would still have been the one ultimately liable for the wrong done Pancoast.

In *Gray vs. Light Company,* 114 Mass., 149, an owner whose chimney, without his consent, had been made unsafe by a gas company's affixing a wire to it so that the chimney fell upon a passerby, was allowed to recover from the gas company for the damages which he had thus to pay.

In *Scullin vs. Dolan,* 4 Daly's (N. Y.) Rep., 163, where a piece of the coping of a chimney fell and injured a pedestrian on the sidewalk, the Court exculpated the land owner because the injury arose from the negligent, unauthorized use of the chimney by a third party.

(7)

To extend the rule relieving an independent contractor as contended for by the defendant where the contractor remains in a position to correct his wrong prior to an injury therefrom would be to carry it to an unjustifiable limit.

Where the contractor's negligent work is *imminently dangerous* or amounts to a nuisance, the rule is inapplicable entirely.

The contractor continues liable, where the work is turned over in a manner so negligently defective as to be imminently dangerous to third persons. *Young vs. Smith and Kelly Company*, 4 Am. & Eng. Ann. Cases, 226.

In *Pennsylvania Steel Company vs. The Contracting Company*, 175 Fed. Rep., 176, 180, the Court said that it was immaterial that the dangerous thing made and turned over by use for others is a structure instead of an article of commerce, such as a drug.

In *Snare and Triest Company vs. Friedman*, 169 Fed. Rep. 1, a recovery was had against an independent contractor who had piled iron beams in a dangerous manner on a public sidewalk, and this without question of the independent contractor's control over his negligent work.

So also, *Smith vs. Elliott*, 9 Pa. 345, 346, and 347.

It is only where the thing constructed *is not imminently or inherently dangerous* that the rule exempting the contractor would be in point, assuming, of course, his control has terminated and he has made an actual and complete delivery.

(8)

It is respectfully submitted that the Circuit Court of Appeals in the prior appeal (238 Fed. Rep. 129, relied upon in its present per curiam opinion) was wrong and that the evidence then and now leaves no room for doubt as to "whether the company should be regarded as an independent contractor, or as a master whose servants are permitted to accept temporary employment under another's control and direction." The Affidavit of Defense *admits* that it was "*the defendant*" that suspended the banner (P. R., p. 14).

This Affidavit of Defense moreover was of record *before* the first appeal by the defendant and was overlooked in the above statement by the Circuit Court of Appeals in 238 Fed. Rep., 129.

The character of the work undertaken by the defendant is immaterial. A corporation is liable for its *ultra vires* torts. *Chesapeake & Ohio R. R. Co. vs. Howard*, 178 U. S., 153; *National Bank vs. Graham*, 100 U. S., 699; *Hannon vs. Siegel-Cooper Co.*, 167 N. Y., 244; *Thompson on Corporations*, Vol. 5, page 225, sec. 5435.

(9)

The Circuit Court of Appeals in 238 Fed. Rep., 129 (being its opinion on the former appeal cited in its last opinion now under review, P. R., p. 222) cited its still earlier opinion in 218 Fed. Rep., 60, a suit which the Electric Company's former counsel had brought, while

ostensibly representing Pancoast, against the municipality of Du Bois. Compare the appearance for Pancoast at page 61 of 218 Fed. Rep., with the appearance for the Electric Company at page 129 of 238 Fed. Rep., and it will be seen that it was the Electric Company's counsel that brought Pancoast's unfounded suit against the municipality, which the Circuit Court of Appeals properly reversed, but that unfounded litigation has never been a reason for denying justice to Pancoast or his estate against the real tort-feasor. This observation would have been unnecessary had the Circuit Court of Appeals based its opinion on the testimony in the record now under review in considering the judgment therein appealed from.

III.

The Plaintiff's Amendment Did Not Change the Cause of Action Nor Introduce a New One.

On the appeal now under review, the defendant raised for the first time in the Appellate Court the question as to the effect of the Statute of Limitations on the amended Statement of Claim which had been filed by the plaintiff on April 27, 1916, before this case was ever in the Circuit Court of Appeals on the first appeal, and even before the trial resulting in the judgment for the plaintiff first appealed from.

(1)

This contention is as unmeritorious as it is untimely.

Effective January 1st, 1916, there was a new Practice Act in Pennsylvania (Act of May 14, 1915, Pamphlet Laws, p. 483; 6 Stewart's Purdon's Digest, p. 7137) pursuant to which plaintiff's amended statement was filed April 27, 1916. Under that Act the question of control by a defendant over the negligent instrumentality causing the injury sued for is specifically required to be put at issue. This was the sole purpose of the amended Statement and in no respect did it change the cause of action.

The cause of action as set forth in both original and amended Statements of Claim was the defendant's negligent *use* of the chimney as a tying post for the banner.

It was the fall of the bricks from the chimney that hurt Pancoast and their falling, which was on October 12, 1912, was due to the defendant's negligent *use* of the chimney. This is, and always has been, the plaintiff's cause of action against the defendant.

The amended Statement of Claim introduces no new cause of action, nor did it in any way change the cause of action as originally averred. In fact, the cause of action is set forth in the original and amended Statements in virtually identical words,—

The cause of action averred in the original statement (P. R., p. 9),—

> "The falling of the bricks which caused the bodily injury to said Vernon W. Pancoast, as hereinabove stated, was due to the negligence of the

said defendant their agents or employees in their use of the said chimney as an anchor for said sign or banner, as hereinbefore set forth."

The cause of action averred in the amended statement (P. R., p. 12),—

"11. The falling of the bricks from said chimney which caused the bodily injuries to said Vernon W. Pancoast, as hereinbefore stated, was due to the negligence of the DuBois Electric Company, its officers, agents or employes, in the use of said chimney, as a fastening for said sign or banner as hereinabove set forth."

The defendant's counsel himself conceded that it is the above quoted paragraph that sets forth the plaintiff's cause of action. He presented a point to the trial Court (P. R., p. 204) as follows:

"Sixth. Under the *eleventh* paragraph of plaintiff's statement of claim in this case, which purports to set out the wrongful act which caused the injury to the plaintiff and under the evidence that the defendant was not in possession of the banner at the time it fell the plaintiff cannot recover and the verdict must be for the defendant."

And that, in fact, is the paragraph of the plaintiff's Statement wherein the cause of action is set forth.

Wherein, then, did the amendment affect the status? Simply in supporting and making more specific the original allegation that it in truth *was* the defendant that on October 12th made the negligent use which the original Statement of Claim averred.

The action was not on the contract of employment, but for the defendant's negligent *use*. To show the complete terms of the employment and that they embraced maintenance of the banner, simply established the verity of the original allegation that on October 12, 1912, when Pancoast was hurt, this defendant was negligently *using* this chimney as an anchor for this banner.

Without an employment embracing maintenance there would have been at the time *no use* at all by the defendant of the chimney, negligent or otherwise, as averred in the original and the amended Statements of Claim. *With* such employment, this original basic averment stood out clear and intact. Here was a mere specification of what had already been averred in general terms, to wit, the *defendant's user* on October 12th.

The plaintiff's action was in trespass, and the terms of the employment were material only in so far as they tended to establish the fact of the *defendant's use* of the chimney at the time Pancoast was hurt, which is averred alike in the original and amended Statements.

Had we sought to aver the fall of a different object, or the use of a different anchor, or the hanging of a different thing, the defendant might doubtless have complained, but no such departure was sought or made. On the contrary, under both pleadings, it was the same injury at the same time and place, to the same person, by the same chimney, pulled down by the same banner, due to the identical carelessness of the same tort-feasor.

There was thus no new, but the same, cause of action.

Not so, the many authorities which the defendant's counsel cited in support of its contention on its *last* appeal to the Circuit Court of Appeals,—the only time that the question of the Statute of Limitations has ever been argued.

Thus, in *Mahoney vs. Park Steel Company*, 217 Pa., 20, the statement alleged an unsafe rest or guide attached to the rolls, and the amendment, a spanner or handle attached to the screw at the housen,—two totally different things.

In *Martin vs. The Railways Company*, 227 Pa., 18, the statement alleged the running down of a pedestrian, the amendment the jerking of a passenger off the car.

In *Philadelphia, Applt., vs. The Railroad Company*, 203 Pa., 38, the statement was based on charters and ordinances, the amendment upon leases and mergers with other companies.

In *Lane vs. Water Co.*, 220 Pa., 599, originally malicious seizure of goods, changed to abuse of civil process.

In *Grier vs. Ins. Co.*, 183 Pa., 334, originally based upon policy of insurance, changed to parol agreement to pay loss.

In *Noonan vs. Pardee,* 200 Pa., 474, originally failure to furnish *vertical* support, changed to removal of *lateral* support.

And so of all the decisions cited. If *ex contractu,* the amendment sought to substitute a different writing, if *ex delicto,* a different instrumentality, or occurrence. Whereas, in the case at bar, there was no change in time, place, persons, actuating cause, instrumentality, or nature of the lack of care. The statement had imputed negligence to the defendant at a certain time and in a certain respect, to wit, in *its use* on October 12th, of a chimney as an anchor for a heavy banner. To show that the contract of employment embraced maintenance, simply established the truth of this allegation of negligence.

It will not be overlooked that the function of the Statute of Amendments is to enable parties freely to amend so that they may develop their proofs in accordance with the facts and in the furtherance of justice. It is only where the amendment after the bar of the statute of limitations introduces a new cause of action, that the Statutes of Amendments do not operate. Here there was no new cause of action, but only the original cause as set up in the original statement, to wit, *the defendant's negligent use on October 12th of the chimney as an anchor for the banner.*

As our amendment merely defined and more particularly specified what the original left general, it was properly allowed. *Stoner vs. Erisman,* 206 Pa. 600; *Fricke vs. Quinn,* 188 Pa., 474.

In *Rodrigue vs. Curcier*, 15 S. & R., (Pa.) 81, the wrong complained of was the defendant's misconduct as agent in the sale of certain cottons. In the original declaration, the employment was averred to be to the effect that the defendant had express orders to make immediate sale at the best price, which he promised to do but did not. The amendment *changed the terms of the employment* by averring a promise by the defendant to use due diligence, skill, and fidelity which he failed to use, and also that he agreed not to wait for an imaginary rise. The court held that the *wrong*, was the defendant's misconduct in relation to the sale of the cottons, and that the substance of the complaint was preserved, to wit, that the plaintiff had been injured by the defendant's mismanagement.

In *1 Enc. of Pl. and Pr.*, 563, it is stated that in suits founded on negligence, allegations of facts tending to establish the same act of negligence may properly be added by amendment.

In *Stewart vs. Kelly*, 16 Pa., 160, 162, the Pennsylvania Supreme Court says that the provisions of the Pennsylvania statute of amendments are mandatory, and that the act should receive a liberal construction. In that case the plaintiff declared upon an alleged delivery and was allowed to amend by averring *a readiness to deliver with a refusal to receive*, and the trial court was reversed for refusing the amendment, because the cause of action, to wit, the loss from the breach, was the same under both pleadings.

In *Painter vs. New River Mineral Company,* 98 Fed., 544, 548, the original declaration alleged that the defendant conveyed water and diverted a certain stream so that materials were deposited on the plaintiff's premises, whereas the amendment alleged that the water *flowed* from a different branch stream, due to the defendant's acts, by which the same consequences occurred. The court held that the cause of action was the causing of the deposit upon the premises, and that no new cause was introduced by the amendment.

The defendant's contention based on the Statute of Limitations is not only without merit but untimely.

(2)

The District Court allowed the plaintiff's amendment, when presented for filing, on *April 27, 1916,* (the defendant filing a mere formal objection) and noted an exception to the defendant (P. R., p. 218). The defendant thereafter on *May 5, 1916,* answered over by its Affidavit of Defense (P. R., p. 14) to the plaintiff's amended statement, putting at issue such matters of defense as was required of it by the Pennsylvania Practice Act, above cited, to wit, the question of control.

Thereafter in *June, 1916,* the case came on for trial on these pleadings as filed, and resulted in a verdict and judgment for the plaintiff.

The question of the Statute of Limitations as to the plaintiff's amended statement was never argued before the trial Court, either before or after judgment.

The defendant appealed from this judgment to the Circuit Court of Appeals, and still the question as to the Statute of Limitations was neither argued in the Circuit Court of Appeals nor was it passed upon by that Court. The Circuit Court of Appeals reversed the judgment (238 Fed. Rep., 129) on the alleged want of control by the defendant, and ordered a new trial.

The case came on for retrial on *June 4, 1917*, and again resulted in a verdict and judgment for the plaintiff. Neither before nor after this judgment was the question of the plaintiff's amended Statement of Claim argued before the trial Court. Again the defendant appealed from the judgment for the plaintiff entered by the District Court on *January 18, 1918*, (P. R., p. 213), and it was not until *February 25, 1918*, that the defendant, by its Bill of Exceptions then filed (P. R., p. 8) on this last appeal, brought forth the exception noted by the District Court on *April 27, 1916*, to its allowance of the plaintiff's amended statement.

On this last appeal, the defendant, by assignment of error based on its Bill of Exceptions filed *February 25, 1918*, raised for the first time in the Circuit Court of Appeals its question as to the plaintiff's amended statement. The Circuit Court of Appeals, however, did not sustain the defendant's contention on this assignment of error, and rightly we respectfully submit, since two trials of the case, each resulting in a judgment for the plaintiff and an appeal therefrom by the defendant to the Circuit Court of Appeals, had been had, all without the question of the Statute of Limitations having

ever been raised by the defendant, or argued in either the trial Court or the Circuit Court of Appeals.

The defendant must be considered as having abandoned its formal exception noted on April 27, 1916, to the plaintiff's amended Statement. In fairness to the trial Court and the plaintiff, it was incumbent on the defendant to assign its exception to that Court's allowance of the plaintiff's amended Statement as error, if not for argument before the trial Court, at least for review in the Circuit Court of Appeals *on its first appeal.*

It was mistakenly asserted in the printed brief filed by the defendant in the Circuit Court of Appeals on its last appeal that the plaintiff's amended Statement of Claim was not filed until after the Circuit Court of Appeals' former decision (238 Fed. Rep., 129) in this case, and that the plaintiff was thereby seeking to conform its pleadings to that decision. *This is not correct.* The plaintiff's amended Statement was filed more than six months before this case was ever in the Circuit Court of Appeals *at all* and more than two months before the trial resulting in the judgment from which the defendant took its *first* appeal.

Under the testimony adduced, as disclosed by the record under review, we respectfully submit that the case was clearly one for the jury.

The trial Court submitted the case in an impartial charge, fairly presenting the issues of fact in dispute and the law applicable thereto.

The verdict was moderate, and judgment was properly entered.

We respectfully submit, therefore, that the Circuit Court of Appeals erred in reversing the judgment of the District Court and that the judgment of the Circuit Court of Appeals should, now, be reversed, and the judgment of the District Court affirmed, with costs.

Respectfully submitted,

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JAMES R. STERRETT,

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CHARLES ALVIN JONES,

Attorneys for Plaintiff.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 300

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, Deceased, Petitioner,

vs.

THE DuBOIS ELECTRIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANT.

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RAFTSMAN'S JOURNAL PRINT, CLEARFIELD, PA.

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TABLE OF CASES CITED.

COUNTER STATEMENT OF THE CASE.

In October, 1912, the defendant company was employed by M. O. Skinner, Chairman of a political committee in the Borough of DuBois, to erect a political banner across East Long avenue in said Borough, stretching from the Deposit National Bank building on the south side of the street to the Commercial Hotel building on the north side of the street. The banner was put up by fastening the upper north corner to an iron strip fastened upon the roof of the Commercial Hotel building, a four story structure. The night following the erection of the banner the fastening at this point broke, probably by an abrasion of the rope or cable, by which the banner was fastened, where it passed over the cornice of the hotel building. The next morning the defendant re-erected said banner and in doing so substituted a wire cable for the rope originally used and fastened the end of it around the base of the chimney standing upon the roof.

After this work was done Skinner was informed of the condition of the work and how it had been prepared and accepted the work from the defendant. This was on the 7th day of October, 1912. The banner so remained without any further connection therewith on behalf of the defendant until the 12th day of October, 1912, when during a wind storm the banner blew down, taking with it the top of the chimney around which it was fastened and some of the bricks struck Vernon W.

Pancoast on the head as he was standing upon the side walk along side of the Commercial Hotel, causing the injuries complained of in this case.

This action of trespass was commenced on October 6th, 1914. Plaintiff filed his statement of claim on February 23, 1915, (P. R., p. 8) averring a careless and negligent erection of the banner.

On April 27, 1916, notwithstanding the objection of the defendant the plaintiff was permitted to file an amended statement of claim (P.R.,p.10) averring not only a negligent and careless erection of the banner but averring a duty on the part of the defendant to maintain said banner while suspended across the street; and that at the time of the accident the banner was under the control and supervision of the defendant.

On May 31, 1916, this case was called for trial following the filing of the amended statement by plaintiff. In that trial, however, the plaintiff did not attempt to offer any evidence to sustain the averment that defendant had undertaken to maintain said banner across the street, or that it was the defendant's duty to so maintain said banner, but the plaintiff tried the case on the theory that there had been a careless and negligent construction and erection of the banner by defendant which made the defendant liable for the injuries sustained by Vernon W. Pancoast. This trial resulted in a verdict in favor of the plaintiff. The defendant sued out a writ of error to the Circuit Court of Appeals for the Third District and the judgment of the trial court was reversed. The allowance of the amended statement was not assigned for error as the new matter averred in the amended statement was not

involved in the question then for decision (see 238 Fed. Rpts. 128).

The case was again called for trial on June 4, 1917. In this trial the plaintiff attempted to offer evidence to sustain the allegation contained in his amended statement of claim relative to the duty of the defendant to maintain said banner across the street, and that the banner was under the control and supervision of the defendant at the time of the accident. The case was tried upon the theory that, to entitle the plaintiff to recover, he must show a duty on the part of the defendant to maintain the banner while suspended, and that it was in the custody and control of the defendant at the time of the accident. This trial resulted in a verdict and judgment in favor of the plaintiff.

The defendant again sued out a writ of error to the Circuit Court of Appeals for the Third District and secured a reversal of this judgment upon the ground that the testimony of the plaintiff showing a duty on the part of the defendant to maintain the banner or that it was in the custody and control of the defendant was insufficient to submit to the jury.

ARGUMENT.

I.

Was the Judgment of Reversal Without a Direction for a New Trial Error?

If we understand the practice in the Courts of the United States, the plaintiff is entitled to have a re-trial of the case upon a reversal of a judgment by the Appellate Court which has been entered on a verdict in favor of the plaintiff. We believe the authorities cited by the appellant sustained this position. If the reversal of the judgment in this case by the Circuit Court of Appeals, without directing a new trial of the case, concludes the plaintiff and prevents a re-trial of the case, we assume that the Circuit Court of Appeals committed error. But we are not ready to admit that the mere reversal of this judgment without directing a new trial does so conclude the plaintiff. The right of a re-trial is secured by the law regulating the practice and the mere failure of the Appellate Court to direct a new trial would not prevent the plaintiff from re-trying the case. If we are wrong in assuming that the plaintiff was entitled to a new trial upon a reversal of this judgment, or if we are right in assuming that the mere failure of the Circuit Court of Appeals to direct

a new trial would not prevent the plaintiff having such new trial, then the judgment of the Circuit Court of Appeals should be affirmed.

II.

Was the Evidence of Plaintiff Legally Sufficient to Submit to the Jury on the Question of Maintenance and Control of the Banner?

When this case was tried in the District Court in May, 1916, it was tried by the plaintiff on the theory of a negligent erection and construction by the defendant. The defendant claimed that there had been no negligent erection and construction; but, if there had been such negligent erection and construction the defendant was only an independent contractor, and having surrendered possession of the banner to the owner prior to the accident, therefore, was not liable. The Circuit Court of Appeals in DuBois Electric Company versus Fidelity Title & Trust Company, 238 Federal Reporter, 129, says:

> "The evidence leaves some room for doubt whether the company should be regarded as an independent contractor or as a master whose servants are permitted to accept temporary employment under another's control and direction * * * * * . For present purposes we shall

treat the contract as an independent employment but clearly it had a very limited object."

The Court also says:

> "The only ground, therefore, for holding the defendant liable to Pancoast would be a continuing duty resting upon the company so to maintain the banner that persons on the street should not be endangered. The plaintiff's difficulty is that no facts were proved to support the inference of such a duty. The company's only relation to the work grew out of its employment by Skinner which was limited in scope and time and had been fully performed."

The opinion and judgment of the court is amply sustained by the Pennsylvania and other authorities therein cited.

Upon the re-trial of this case in June, 1917, the plaintiff attempted to meet the requirements of this ruling by proving that there was a contract between M. O. Skinner and the defendant company, under the terms of which the company agreed to erect the banner, take it down after the election and to maintain it between the time of its erection and the time it was to be taken down. The case was tried upon the theory that there could be no recovery in this case unless the plaintiff established a continuing duty resting upon the company to so maintain the banner that persons on the street should not be endangered.

To establish this contention the plaintiff called M. O. Skinner, who testified as fol-

lows (P. R., p. 28): "I went to the DuBois Electric Company and asked them to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it; I wanted them to attend to it. I didn't want to go on the roof. After some little discussion two of the employees of the electric company went with me to the club rooms and secured the banner and brought it down."

Again he says, (P. R., p. 20): "I went to the electric company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it, I wouldn't go on the roof and wanted them to attend to it. That was my statement at the time". In P. R., page 27, appears this question and answer:

Q. Did you have any further conversation with them, then about the matter?

A. Nothing more than the two fellows were sent with me to get the banner.

In P. R., p. 23, appears this question and answer:

Q. Did you give any directions to them to remove it?

A. Nothing more than when I asked them to put it up, I wanted them to take it down.

In P. R., p. 37, appears these questions and answers:

Q. At the time you left the office down there, you

simply had the intention of having them take the banner down after the election?

A. Yes.

Q. And there wasn't any definite arrangement made at that time that they were to take it down after the election.

A. No, sir.

This is the evidence upon which the plaintiff relied to establish the duty upon the defendant of maintaining this banner and showing that it was under the control of the defendant at the time of the accident. The defendant contends that this testimony was insufficient for this purpose; and that there was nothing to submit to the jury. The sufficiency of the testimony to establish a fact, if believed, is always to be determined first by the Court.

Whether there is evidence of a fact is always a matter of law, and whether the evidence is sufficient is a matter of law. Whether the evidence be written or parol the rule is the same. In every case the court must first determine whether the plaintiff has submitted sufficient testimony in support of the allegation to sustain a finding by the jury in favor of the plaintiff. The burden was on the plaintiff to show a contract on the part of the company to maintain this banner. Without such a contract there would be no continuing liability or duty resting upon the defendant. Without such a continuing liability or duty there was no duty owed by the company to Pancoast. While the defendant denies the contract as testified to by Skinner, we treat the testimony of Skinner, for the purpose of this

case, as true and as admitted; but deny that it establishes a contract of maintenance, or that it is sufficient to sustain an inference of such a contract on the part of the defendant. It was the duty of the court to say to the jury that the contract as testified to by Skinner was legally insufficient to impose upon the defendant the burden of maintaining this banner while suspended across the street, and that the alleged contract did not put the control of this banner in the company at the time of the accident.

Skinner's testimony shows that there were only two things talked about, viz: The putting up of the banner and taking it down after election. When he says:

> "I wanted them to attend to it, I didn't want to go on the roof,"

the word "it" refers to the two things spoken of by Skinner. These were to put up the banner and take it down after the election. No proper interpretation of this language can possibly make a contract to maintain the banner between the time of its erection and the time it was to be taken down. It was the duty of the court to aid and guide the jury by passing upon the legal sufficiency of the testimony to establish the contract averred or the continuing duty resting upon the defendant. In place of doing this the jury was permitted to simply guess at the matter and to determine, without any rule to govern them, whether this language imposed upon the defendant the duty of maintaining the banner.

We maintain that whether the action be in contract or in tort, and whether the evidence be written or parol, it is the duty of the court to determine

whether or not the evidence on the part of the plaintiff is sufficient, if believed by the jury, to establish the averments of fact.

The preliminary question of law for the court is not whether there is literally no evidence or a mere scintilla, but whether there is anything that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the parties on whom the burden of proof rests it should be submitted; if not, it should be withdrawn.

Hyatt vs. Johnson 91 Pa. 196-200

McKnight vs. Bell, 135 Pa., 358-372

Burk vs. Burk, 240 Pa., 379-387

In *Bannon vs. P. R. R.,* 29 Pa., Sup. Ct. 231, on page 238, Orlady, Justice, says: "In every jury trial there is a preliminary question for the court. The court must decide whether or not there is sufficient evidence on which the jury could base a verdict for the plaintiff. If there is no evidence or if it is such that in a fair, legal construction it does not sustain the plaintiff's case and that no fair inference to be drawn from it, sustains it, the court should give the peremptory instructions to find for the defendant."

In *Howard Express Company vs. Wile,* 64 Pa., 201, Sharswood, Justice, says: "But in a case in which a court ought to say that there is no evidence sufficient to authorize the inference, then the verdict would be without evidence, not contrary to the weight of it. When-

ever this is so, they have the right and it is their duty to withhold it from the jury."

In *Lanning vs. Pittsburgh R. Co.*, 229 Pa., 575. Brown, Justice, says: "The error complained of is that he (the court below) permitted them (the jury) to pass upon the question of the defendant's negligence without any evidence to support it. Whether there was any such evidence was a preliminary question for the court, whose duty it was to have withdrawn the case from the jury, if there was no evidence that ought reasonably to have satisfied them of the negligence which the plaintiffs were called upon to prove."

In *Codding vs. Wood*, 112 Pa., 371, it was attempted to establish a contract by parol evidence. The Supreme Court held that taking the evidence as true it was insufficient to establish the contention claimed for.

In *Elliott vs. Wanamaker*, 155 Pa., page 67, an oral contract was involved. The Supreme Court says: "The province of a jury is to settle disputed questions of fact. If no such disputed facts exist there is nothing for them to do and it is for the court to determine the legal effect of the contract".

In the above case the plaintiff contended that the court could not pass upon the sufficiency or legal effect of the plaintiff's testimony because the alleged contract was parol; that the case should be submitted to the jury to determine what the contract was, and to determine the rights of the parties. The Supreme Court refused to adopt this view.

In *Penniston vs. Huber Company,* 196 Pa., 580, an alleged parol contract was involved. It is there decided that disputed facts connected with the discharging of an employee are for the jury; but whether such discharge was proper under undisputed or admitted conditions is for the court. On page 585 Justice Brown says:

"This was insubordination and misconduct fully justifying his discharge, and the learned trial judge should have so instructed the jury instead of allowing them to determine whether he had been dismissed from service improperly and without cause."

When the facts are admitted or there is no dispute as to the parol testimony relied upon to establish the contract, whether the testimony is sufficient to establish the contract, and its force and legal effect are questions of law for the court.

Erie Forge Company vs. Pa. Iron Works Company, 22 Pa., Sup. Ct. 550.

Whether spoken words constitute a contract of warranty of personal property sold is a question of law for the court. The words spoken are not to be submitted to the jury and the jury permitted to determine whether there was a contract between the parties or not. The legal effect of the words is first for the court. If the words spoken are insufficient in law to establish the contract claimed then there is nothing to be submitted to the jury and the court should give binding instructions for the defendant.

Holmes vs. Tyson, 147 Pa. 305

Wilkinson vs. Stitler, 46 Pa., Sup. Ct. 407

Where there is evidence which would justify an inference of a disputed fact it must go to the jury, but not where there is no evidence to authorize the inference; and when oral testimony fails to establish a disputed fact the judge should withhold it.

Maynes vs. Atwater, 88 Pa. 496

When there is no dispute as to the terms of the oral contract its construction is for the court, and it is as much the duty of the court to interpret oral contracts as written ones.

9 Cyc. 786

Where the terms of an oral contract are shown without any conflict of evidence its interpretation, as in the case of written contracts, is a question of law for the court.

9 Cyc. 592

The burden rested upon the plaintiff to establish a continuing duty on the defendant to so maintain this banner that persons on the street should not be endangered. There would be no such duty unless the defendant company had been employed so to maintain the banner between the time of its suspension and the time of taking it down. If the plaintiff failed to offer testimony legally sufficient to sustain the finding by the jury that there was such a contract on the part of the defendant, it was the duty of the court to refuse to submit the testimony to the jury. We submit that the Circuit Court of Appeals was right in holding such testimony too vague, indefinite and uncertain, and in reversing the court below on this point. The Circuit

Court of Appeals should be affirmed as to this part of the case.

III.

Did the Plaintiff's Amendment to Its Statement Change the Cause of Action and Introduce a New One?

In plaintiff's original statement (P. R., p. 8) it was alleged that the defendant constructed, erected or stretched the banner across the street, and that its employment covered nothing more. In plaintiff's amended statement (P. R., p. 10) it is averred that the contract by the defendant covered the maintenance of said banner across said street and that the defendant did so maintain said banner. In the original statement the plaintiff claims the defendant was liable for these injuries by reason of its negligence in the construction and erection of the banner. This would be the cause of action. The amended statement charges not only negligence in the original erection of this banner, but it charges the duty of maintenance, avers the control and supervision of the banner to be with the defendant, and that the accident was the result of negligence on the part of the defendant in not maintaining this banner in a safe condition while it was in the control and supervision of the defendant. The cause of action relied upon here was the violation of the duty of maintenance and proper control and supervision. Is there

not an entirely new cause of action averred in the amended statement?

Under the first statement the investigation would be confined to an inquiry as to two questions:

(a) What was the character of the original construction?

(b) Was the work upon its completion surrendered to the owner?

Under the amended statement entirely new questions of investigation were raised:

(a) Had the defendant agreed to maintain the banner?

(b) Was there a duty resting upon the defendant to maintain this banner?

(c) Was the banner under the control and jurisdiction of the defendant?

(d) Was the accident caused by the failure of the defendant to properly maintain the banner?

If the amended statement introduced a new cause of action, to-wit: the duty on the part of the defendant to maintain this banner across the street, it was barred by the statute of limitations at the time that it was allowed. It was under this new averment of this new duty that the plaintiff sought to recover in the last trial of the case. Without such an averment in the pleadings there could be no recovery. That a party will not be permitted to shift his ground or enlarge his surface by introducing a new and different cause of action barred

by the Statute of Limitations is well settled by the law of Pennsylvania.

Philadelphia vs. R. R. Co., 203 Pa. 38

Mahoning vs. Park Steel Co., 217 Pa. 20

Martin vs. Pittsburgh Railways Company, 227 Pa., 18.

A cause of action in a personal injury case of this character involves a duty which the defendant owes to the plaintiff, a violation of that duty by the defendant and an injury resulting to the plaintiff thereby. It is always necessary to aver the duty, the violation thereof and the resultant injury. When this is done it constitutes the cause of action. Nothing was averred in the original statement about the duty of maintaining this banner, no violation of such duty was averred and no injury resulting to the defendant by reason of the violation of that duty was so averred. This was set forth only in the amended statement. It is a shifting of the ground upon which the plaintiff seeks to recover from the defendant, and being barred by the Statute of Limitations, the amendment should not have been allowed.

In *Lane vs. Sayre Water Company,* 220 Pa., 599, a change in the statement from the averment of a malicious seizure of goods by unlawful process to an averment of an abuse of civil process by an excessive seizure of goods was refused after the expiration of the Statute of Limitations.

In *Grier vs. Northern Assurance Company,* 183 Pa., 334, suit was brought on the policy of insurance. After the Statute of Limitations had run the plaintiff

amended by averring the parol agreement by the company to pay the loss. This was held to be a new cause of action.

In *Card vs. Slowers Port P. & P. Co.,* 253 Pa., 575, the action was a common law action for negligence. After the Statute of Limitations had run the plaintiff attempted to change his cause of action by alleging negligence in failing to guard a crank shaft as required by the Act of May 2nd, 1905, P. L. 352. Such amendment was not allowed.

In *Noonan versus Pardee,* 200 Pa., 474, suit was brought to recover damages for the failure to furnish vertical suppport to the surface in mining underneath. Plaintiff subsequently attempted to amend by averring the removal of the lateral support. This was held to be a new cause of action and the amendment could not be allowed after the running of the Statute of Limitations.

In *Mifflintown Bank vs. New Kensington Bank,* 247 Pa., 40, the original statement averred the cause of action as a contract for the purchase of "bills of lading for grain", after the statute of limitations had run plaintiff proposed to amend its statement by averring that the contract was for the purchase of "sight drafts with bills of lading for grain attached thereto". The Supreme Court held that this introduced a new cause of action and could not be allowed after the Statute had run.

The allowance of this amendment is *res adjudicata*, so as to prevent the defendant from objecting to

the enforcement of the amendment, if it appears that it was improperly allowed.

Grier Bros. vs. Assurance Company, 183 Pa., 334

It was not necessary for the defendant to plead the Statute of Limitations in this action of trespass in order to enable it to object to the allowance of the amendment, or to have the matter reviewed upon appeal.

Martin vs. Pgh. Rys. Co., 227 Pa., 18

Was the defendant precluded from raising this question at the time this case was last argued in the Circuit Court of Appeals? The allowance of this amendment was not assigned as error at the time the case was argued in the Circuit Court of Appeals, report of which is made in 238 Federal Reporter, page 129. There was no necessity in raising this question at that time. The case had been tried in the court below on the averment of the negligent construction and erection of the banner, and the alleged duty of the defendant to maintain the banner was not involved in that trial. All the evidence that was submitted by the plaintiff upon that trial of the case could have been admitted under the original statement averring only a negligent construction and erection. This same averment was also contained in the amended statement and this testimony was also relevant to that averment. It was only after the reversal of the case by the Circuit Court of Appeals as reported in 238 Federal Reports, 129, that the plaintiff attempted to make use of the new cause of action as alleged in the amended statement. When this was done and the testimony admitted for the purpose of es-

tablishing this new duty then it became necessary for the defendant to raise this question on appeal. The allowance of this amendment was assigned for error. It is true that the Circuit Court of Appeals did not pass upon this assignment but rested its opinion upon the insufficiency of the evidence to establish a contract on the part of the defendant to maintain this banner across the street, but we maintain that this question is still in this case, and that the plaintiff had no legal right to the amendment as allowed. The objections made to this amended statement by the defendant were not informal. In P. R., p. 218, will be found the objections as made at the time by the defendant. They are full and complete and sufficient to protect the interests of the defendant.

Even if the plaintiff would be entitled to a re-trial of this case, we submit that the Circuit Court of Appeals should be affirmed in holding that the testimony in this case was insufficient to establish a continuing duty to maintain this banner across the street, and that no recovery could be had by the plaintiff against the defendant under the evidence as contained in this record. We further maintain that the plaintiff was not entitled to file its amended statement of April 27, 1916.

All of which is respectfully submitted.

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